TM v Disclosure and Barring Service
[2023] UKUT 192 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-001729-V
(formerly V/1151/2021)

On appeal from the Disclosure and Barring Service

Between:

TM

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: **Deputy Upper Tribunal Judge Rowland**
Mr John Hutchinson
Mr Roger Graham

Decided on consideration of the papers

Representation (in writing only):
Appellant: in person
Respondent: Mr Tim Wilkinson of Counsel, instructed by Legal Adviser, DBS

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the Disclosure and Barring Service notified on 12 May 2021 was made in error of law and is set aside. The case is remitted to the Disclosure and Barring Service for a new decision.

REASONS FOR DECISION

1. This is an appeal, brought under section 4 of the Safeguarding Vulnerable Groups Act 2006 with permission given by Deputy Upper Tribunal Judge Rowland, against the decision of the Disclosure and Barring Service ("DBS") notified on 12 May 2021 to include the Appellant in the Adults' Barred List maintained by DBS under section 2 of that Act.

2. The Appellant had been convicted in June 2020 of three offences under section 1(a) of the Protection of Children Act 1978, three offences under section 4(1) of the Sexual Offences Act 2003, one offence under section 12(1)(a) of that Act and one

offence under section 63 of the Criminal Justice and Immigration Act 2008. He had been on a chat group in conversation with a person whom he thought was a 14-year-old boy but who was in fact an adult. He initialised the sexualisation of the conversation, asked the victim for an image of his penis, sent him four images of penises, two of which showed ejaculations, and described the sexual behaviour he would like to engage in if they met. The adult with whom he was in fact communicating was a member of an online child abuse activist group who subsequently confronted him and reported him to the police. The police seized mobile telephones and a laptop on which were found a number of indecent images, both still and video, of which 75 were category A, 70 category B, 59 category C and 39 (all bestiality videos) were classified as extreme. They also found evidence of other chat group conversations, in one of which, apparently with a 16-year-old boy and not in itself illegal, he said words to the effect that "I like younger, 13 to 19", apparently indicating a sexual interest in boys aged 13 to 19. For the purposes of this appeal, it is unnecessary to go into the facts more deeply. The Appellant admitted the allegations put to him and in due course was convicted, on his guilty pleas, of the offences mentioned above and sentenced to a total of 12 months' imprisonment.

3. Shortly before he was sentenced, the Appellant applied for a position as a volunteer befriender/shopper for elderly vulnerable adults and sought an enhanced check from DBS. This resulted in DBS considering whether he should be included in the Children's Barred List and the Adults' Barred List. On 12 May 2021, after receiving representations from the Appellant, DBS informed him that it had included him in both lists. The Appellant has not challenged the decision to include him in the Children's Barred List, but he appeals against the decision to include him in the Adults' Barred List.

4. Section 4 of the 2006 Act provides:

> **Appeals**
>
> **4.—**(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
>
> (a). [*repealed*]
>
> (b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;
>
> (c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.
>
> (2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—
>
> (a) on any point of law;
>
> (b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
>
> (3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
>
> (4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.
>
> (5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS .
>
> (6) If the Upper Tribunal finds that DBS has made such a mistake it must—
>
> (a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

5. The effect of subsections (2) and (3) is that there can be an appeal on either law or fact, although a decision on appropriateness, which is not itself a question of either law or fact, may only be challenged on the ground that it was wrong in law. A decision may be wrong in law because, among other reasons, inadequate reasons have been given for it or because inclusion in a list is disproportionate. A "mistake" of law or fact is an error that might have, or would have, made a difference to the outcome (*R (Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin), [2011] 1 WLR 1193 at [102]). If there is no such mistake, because there was no error or any error could not have made a difference to the outcome, the Upper Tribunal must confirm DBS' decision under subsection (5). If there is such a mistake so that subsection (6) applies, the Upper Tribunal may direct the removal of the appellant from the relevant list only if that is the only decision that could lawfully be made; otherwise, it must remit the case to DBS (*Disclosure and Barring Service v AB* [2021] EWCA Civ 1575).

6. In our judgment, it is open to DBS to argue on an appeal that an error would, or might, not have made a difference to the outcome on grounds that are additional or alternative to those set out in its decision letter and, if a case is remitted to it, may usually take such additional or alternative grounds into account when making its new decision whether or not they were raised in the appeal. There is an obvious public law interest in the "right" decision being made, irrespective of the earlier history of the case, subject, of course, to the other party having a proper opportunity to address any new argument. In the present appeal, though, DBS has not advanced any new arguments.

7. DBS's reasons for including the Appellant in the Adults' Barred List appear from the following part of the decision letter (to which we have added paragraph numbers for ease of reference) –

> "(xiii) It is acknowledged that your offending was in relation to children and that there is no evidence of any harm to a vulnerable adult. However, your online sexual communication was not just carried out against the 14 year old victim as you also exchanged messages with a 16 year old male; whilst this is not illegal, it demonstrates that you hold a sexual interest in post pubescent children who are deemed to have the physical attributes of an adult. You also informed the 16 year old boy words to the effect of 'I like younger 13 to 19'. It is acknowledged that your representations dismiss the relevance of this statement stating that it was made when you were offending which you have effectively moved away from. However, the statement is deemed to indicate a sexual preference for young people in this age range at the time your offences were commissioned [sic].
>
> (xiv) Your actions are also deemed to be exploitative as you provided false details regarding your identity and age, stating that you were 28. The OASys report states that you misrepresented yourself as a younger man in order to facilitate contact with vulnerable victims. Your behaviour also

exploited the suffering and experiences of the children subjected to sexual abuse in the material you viewed. You also sought to exploit the vulnerability by age of the 14 year old boy you believed you were in communication with for your own sexual gratification. It is acknowledged that you have undertaken work to build relationships in the real world rather than relying on online communication; however, the long term success of this, together with the other measures you have undertaken, cannot not [sic] be determined.

(xv) That you have demonstrated a willingness to exploit the vulnerabilities of others in order to carry out your offending behaviours, that you were prepared to provide false details and hide your real identity in order to facilitate sexual communication, that your offending behaviour was escalating to incorporate messaging around meeting a person you were in communication with, that you ignored the suffering of others in the material you viewed for your own gratification and that you have expressed a sexual interest in young adults aged 18 and 19 are deemed to be transferable to regulated activity with vulnerable adults.

(xvi) The DBS have not dismissed, ignored or diminished in any way the work you have undertaken to address your offending and the progress you have made. It is acknowledged that you have engaged positively with probation and updated them on your employment plans. It is also acknowledged that you feel you have the strategies and support to assist you in dealing more appropriately with stresses and thus preventing you from re-offending. However, you are still subject to the terms of the Sexual Harm Prevention Order and Sex Offender Registration. It is therefore deemed to still be valid that your resilience has not been tested outside of the close support that you are still subject to and are able to call upon, both compulsory and voluntarily. Given the length of time the offending occurred, the escalation in behaviours and the sexual gratification you obtained from the exploitation of the vulnerabilities and suffering of the victims. The DBS cannot conclude that you would not resort to engaging in sexualised behaviour with vulnerable people as means of coping with stress or of obtaining sexual gratification.

(xvii) It is also acknowledged that you stated that, due to the work you have undertaken, it would not be justified to bar you from working with vulnerable adults and provide you with such a "blanket ban". However, the DBS cannot differentiate on the basis of age and must consider engagement in regulated activity with vulnerable adults as a whole. Whilst it Is acknowledged that there are no concerns regarding your conduct towards vulnerable adults, that you assisted a vulnerable adult with shopping and provided voluntary support at Christmas to elderly adults; it remains a concern that you have demonstrated a sexual interest in post-pubescent children and your expressed sexual preference included people aged 18 and 19 who would fall into the definition of adults.

(xviii) It Is acknowledged that you have provided voluntary support and assistance with a range of services and organisations without concern. However, the DBS is not aware that this was carried out unsupervised on a one to one with vulnerable adults belonging to the age range you expressed a sexual preference for.

(xix) Your behaviour raises concerns that, should you hold a duty of care towards an 18 or 19 year old vulnerable adult, where you are no longer subject to close scrutiny and should you encounter personal stresses, that you would seek to engage in sexual behaviour with that vulnerable adult, for your own gratification and irrespective of the impact the behaviour would cause for the victim. That you described the physical sexualised contact you would like to engage in, it is a further concern that you would exploit both the contact any such role affords you, and the vulnerabilities of the adult in order to engage in sexualised conduct, including contact offending. Any such behaviour would expose the victim to both emotional and physical harm.

(xx) Finally, by gaining sexual gratification from viewing material depicting the sexual abuse and exploitation of children, including the rape of a 3 year old child, over a prolonged period of time (3 years), by viewing material depicting penetrative sexual activity between humans and animals and stating words to the effect of 'I must have an unhealthy interest in that' and 'it was for a sexual reason' when asked about the material of this nature found in your possession, by exploiting the vulnerability of others by engaging a person you believed to be a 14 year old child in sexual communication, escalating the contact into a discussion about the sexual behaviours you would like to participate In with the victim at a meeting, by justifying such behaviour as 'protecting' the child and expressing a sexual interest In those aged 18 and 19; would call into question the DBS' ability to safeguard members of vulnerable groups should it allow a person who has demonstrated an interest in such deviant sexual behaviours to engage In regulated activity with vulnerable people.

(xxi) It is acknowledged that your inclusion in the Adults' Barred List could result in significant interference with your rights under the Human Rights Act; however, any safeguarding decision must take into account not only the rights of the referred person, but also those of the members of the vulnerable group deemed most at risk of harm. That you exploited the vulnerabilities of others for your own sexual gratification, that your offending behaviour was escalating and indicated a willingness to participate in contact offending, that you have expressed a sexual interest in those aged 18 and 19, that your resilience and coping strategies have not been tested outside of the control and support of the organisations and professionals you currently engage with and that you have demonstrated a willingness to engage in deviant sexual behaviours; supports the conclusion that your inclusion in the Adults' Barred List is both an appropriate and proportionate safeguarding measure irrespective of the personal impact such a measure brings.

(xxii) The DBS is not aware that have previously relied upon regulated activity with vulnerable adults for your employment and financial support.

(xxiii) It is acknowledged that, since your arrest, you have determined to use your experiences to support others and, to this end, you have participated in a number of roles with different organisations. Whilst your inclusion in the Adults' Barred List will preclude you from some activities; it will not prevent you from using your experiences to support others in a peer mentoring capacity or in the preparation of support packs for prison/NHS services.

> (xxiv) As a result, we included your name in the Adults' Barred List using our barring powers as defined in Schedule 3, paragraph 8 of the Safeguarding Vulnerable Groups Act 2006 (SVGA) on 11/05/2021."

8. The Appellant originally applied for permission to appeal on six grounds. All amounted to points of law, the first three challenging the decision on the grounds that inadequate reasons were given for finding that he had a sexual interest in young adults, that that finding was not supported by adequate evidence and that the decision to include him in the Adults' Barred List was disproportionate, and the other three arguing that the process leading to the decision was procedurally unfair. Although one ground was abandoned by the Appellant and he was given permission to appeal only on the other five, we will comment also on the abandoned ground.

9. Neither party wished there to be an oral hearing and Upper Tribunal Judge Perez directed that the case be heard on the papers. The Appellant's grounds are clearly set out and Mr Tim Wilkinson of counsel has made a commendably succinct response to them on behalf of DBS, to which the Appellant did not wish to reply. We are quite satisfied that it was fair to proceed without an oral hearing. The Tribunal met remotely by videolink in order to consider the case.

10. The Appellant's first two grounds of appeal are closely linked. In his first ground, the Appellant argues that –

> "[t]he reasons given by the DBS for including me on the Vulnerable Adults Barred list appears to be limited to content of a conversation whereby I identified that I like '*13 to 19 year olds*' in a message I had with a 16 year old boy. This statement was made without conscious thought and was part of my offending behaviour at the time and which has been recognised by my Probation and MOSOVO officers. Furthermore, the DBS identify that by conversing with a 16 year old boy that I have '*an interest in post pubescent children who are deemed to have physical attributes of an adult*'. Having reviewed the decision notice, it would appear that the DBS relies on this reason alone for including me on the Vulnerable Adults Barred list. It is important to note that my OASYS report identifies that I am of low risk of re-offending and in particular, low risk of offending against adults."

In his second, ground, he argues that –

> "[t]he DBS have clearly made a loose and tentative assumption that on the basis of this conversation that I have an '*interest in post pubescent children who are deemed to have the physical attributes of an adult'*. There is no evidence in the information supplied by the police that would substantiate this statement."

11. Mr Wilkinson points out that the Appellant has never denied saying "I like younger 13-19" and he argues that the statement is supported by the Appellant having engaged in sexual communication with a person he believed to be 14 years old, by him having made the comment while in a chat with a 16-year-old and by the OASys Assessment identifying that there was "a specific risk of sexual grooming targeted towards boys (11-16)" (page 112). He further argues that that evidence supports the finding that the Appellant posed a risk, not only to children, but also to young adults and he observes that the decision letter said that "the statement is deemed to indicate a sexual preference for young people in this age range at the time your offences were commissioned" (at paragraph (xiii)).

12. It is, in our judgment, relevant that the Appellant has never said that he does not in fact have any sexual interest in young adults or, indeed, not so young adults. In the absence of any such evidence from him, we consider that DBS was quite entitled to rely on what the Appellant had said online and not to accept his somewhat vague assertion that his statement "is all part of the offending behaviour at the time and has no substantive meaning". That there was no evidence that the Appellant had actually committed a criminal offence against a young adult was not compelling evidence that he had no sexual interest in such people. We accept that, far from being an "assumption", DBS made an adequately reasoned finding as to the Appellant's interest that was based on uncontested evidence. Accordingly, we reject grounds 1 and 2.

13. We would also point out that there is some further evidence that the Appellant has a sexual interest in adults. In the letter from Mr Andy Green of Safer Lives, misdated 3 May 2019 – it clearly should have been dated 3 May 2020, as the Appellant has said (page 167, footnote) – there is a reference to "online sexual behaviours with adults [that] helped alleviate some of the anxiety he has in 'real world' offline situations" (page 168). There is no evidence that any such behaviour involved the commission of a criminal offence, but sexual behaviour with a *vulnerable* adult might do so and if, as the Appellant is recorded in that letter as having said, he "felt more competent and in control" with younger people online, it could be argued that he might similarly feel competent and in control with a vulnerable adult, and not necessarily online. DBS, though, has not advanced such an argument in relation to adults over 19. Although Mr Wilkinson submits that one cannot simply draw a boundary between a child of 17 and an adult of 18 or 19, DBS appears to be content to draw a boundary between an adult of 19 and one of 20.

14. This is relevant to the Appellant's third ground of appeal, which is that the decision to include him in the Adults' Barred List was not proportionate, given that DBS appears to have concluded that he was a risk only to young adults aged 18 or 19, particularly as the regulated work he had previously been undertaking was with the elderly.

15. When giving permission to appeal, Judge Rowland said that it was arguably unclear whether DBS considered the Appellant to be a risk only to vulnerable adults aged under 20 or to vulnerable adults in general and, if the latter, why. As we have said, it is arguable that there are grounds upon which it might be argued that the Appellant poses a risk to those older than 19, but it is clear from Mr Wilkinson's submission that that is not part of DBS's current case notwithstanding the reference in paragraph (xv) of the decision letter to certain behaviour being "deemed to be transferable to regulated activity with vulnerable adults".

16. DBS's reasons for finding it to be proportionate to include the Appellant in the Adults' Barred List are set out in paragraphs (xxi) to (xxiii) of the decision letter. When giving permission to appeal, Judge Rowland said that it was arguable that the second sentence in the second paragraph on page 237, which is effectively reproduced as the second sentence of paragraph (xxi) of the decision letter, was a mere assertion for which no explanation has either been given or is self-evident. Mr Wilkinson demurs and submits that it is an analysis of the evidence. We accept that that is so insofar as it is an assessment of the risk posed by the Appellant to young adults aged 18 or 19, but it does not address the Appellant's argument on proportionality, which is that it was not proportionate to impose a blanket ban on

working with all vulnerable adults, irrespective of their age, when he is apparently considered to be a risk only to those under the age of 20.

17. DBS's argument appears to be that barring the Appellant from working with vulnerable adults under 20 is justified – and we accept that that is so for the reasons given by DBS – but that, because the legislation does not allow a person to be barred only from working with that age group, it is therefore necessary for the Appellant to be barred from working with all vulnerable adults. See paragraph (xvii) of the decision letter, where it is said that "the DBS cannot differentiate on the basis of age and must consider engagement in regulated activity with vulnerable adults as a whole".

18. We are not satisfied that that reasoning is sufficient. When Judge Rowland gave permission to appeal, he said that it was arguable that the fact that the legislation does not allow DBS to bar a person from working with adults under the age of 20 (or any other specific age), without barring him of her from working with vulnerable adults cannot make proportionate a decision that would otherwise be regarded as disproportionate. Mr Wilkinson has not taken issue with that suggestion, merely pointing out that DBS had actually given consideration to the "blanket ban" in view of the Appellant's stated interest in 18 and 19 year olds.

19. However, a measure can be proportionate only if it is appropriate and necessary to achieve its objective. Thus, to the extent that a bar on working with vulnerable adults that is intended to protect a small class of such adults prevents a person from working with other vulnerable adults, it must be shown that the wider bar is, in reality, necessary in order to protect the small class. In the context of the present case, that seems to us to require some consideration of, for instance, the likelihood of the Appellant seeking to engage in regulated activity with young adults in the absence of inclusion in the Adults' Barred List, including having regard to any undertaking of the Appellant in that regard and to the information that may be included in an enhanced DBS check. If there is no significant likelihood of the Appellant working with younger adults, then it is not necessary to include him in the Adults' Barred List, a point that is more generally recognised in the 2006 Act by, for instance, paragraph 8(2)(b) of Schedule 3, which makes it a condition of including a person in the Adults' Barred List under that paragraph that "the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults". That condition is, of course, met in the present case, but it is not clear that the Appellant has been, or might in future be, engaged in regulated activity relating to vulnerable 18- or 19-year-old adults.

20. In these circumstances, we allow this appeal, not on the ground that including the Appellant in the Adults' Barred List is disproportionate, but on the ground that DBS has not provided adequate reasons for finding that it is proportionate.

21. We can deal with the Appellant's other grounds of appeal fairly briefly. His fourth ground of appeal is that he was not given an opportunity to comment on DBS's concern that he had an interest in post-pubescent children. We accept Mr Wilkinson's submission that, not only did the Appellant have an opportunity to address that concern, he actually did so and made exactly the same point about it as he has made on this appeal. The Appellant's sixth ground of appeal is that, although it had been suggested to him that DBS might well seek information from other agencies with whom he had engaged, including his probation officer, or might commission an independent risk assessment, it had not done so. We agree with Mr

Wilkinson that DBS was under no legal obligation to take such courses of action and that it was entitled to assess the risk posed by the Appellant on the information already available to it. It may, however, be necessary for DBS to revisit this issue when it reconsiders the Appellant's case in the light of our decision.

22. The Appellant's fifth ground of appeal was the one that he abandoned. His argument was that he had been allowed to make oral representations to DBS in a 2-hour telephone conversation on 7 April 2021 and that, in breach of the *DBS oral representations guide* (which is published on the internet), he had not been provided with a written summary of his oral representations and given an opportunity to provide comments as to its accuracy. Accordingly, he submitted, there had been a procedural error. When Upper Tribunal Judge Wikeley directed DBS to provide a copy of its summary, DBS replied (page 240) –

> "The Respondent confirms that a telephone conversation took place with the Applicant on 7 April 2021 and that during this call his further and substantial written submissions, dated 6 April 2021 and received on the same day, were discussed. The Respondent considered that the purpose of the telephone call was to discuss the Applicant's written representations, rather than to hear oral representations. The Respondent did not therefore produce a written summary of the call as it would on those occasions it hears oral representations. Accordingly, the Respondent regrets that it is therefore unable to provide the Upper Tribunal with a written summary of the discussion in accordance with Directions.
>
> The Respondent notes that the Applicant was not, in accordance with its guidance for Oral representations, entitled to make oral representations to it. The Respondent's guidance permits it to hear oral representations in those albeit, [sic] limited circumstances where an individual might be disadvantaged by the requirement to make written representations or indeed, where he might be unable to do so. The Applicant's further written representations were in fact, lengthy, necessarily complex and detailed, comprising some 46 pages.
>
> Despite the apparent misunderstanding regarding the purpose of the 7 April 2021 telephone conversation, the Respondent does not consider the Applicant to have been materially disadvantaged …"

The Appellant replied to the effect that he had understood that he was providing oral representations and he said that he had been told at the start of the telephone call that notes would be taken but that no voice recording could be made due to staff having to work from home. However, he said that he wished his case to go ahead on the other grounds but not this one.

23. It was sensible to abandon this ground of appeal. DBS could not provide a summary that it did not have and, even if there had been a procedural error, it would not have amounted to a mistake of law unless it was material in the sense that it might have affected the outcome. Had the Appellant thought that something important had been said during the telephone conversation that had not been taken into account, he could have said so and, indeed, he did in relation to his sixth ground of appeal. In the absence of any note, DBS might have had some difficulty in showing that the Appellant's evidence as to what had been said should not be accepted although, as an appeal lies on questions of fact as well as law, it might not have mattered whether he had raised the point in the conversation or not. As it is,

there is no evidence of any unfairness in this case arising out of DBS not providing a note of the telephone conversation.

24. However, it seems to us that it is difficult to say that the Appellant's participation in the telephone conversation did not in fact amount to making oral representations, even if he actually said nothing new, and it seems surprising that, as DBS presumably initiated the call, no note was taken that could have been provided to the Appellant and to the Upper Tribunal. On the other hand, we acknowledge that working arrangements during the Covid-19 pandemic may have been less than ideal and it may be that DBS really considers that the telephone call should not have taken place.

25. In any event, the point in mentioning this ground of appeal is that it seems to us that, if DBS does occasionally find it necessary or convenient to speak to a person about his or her written representations in order to obtain further information or clarification, this should perhaps be recognised as a second exception – additional to meeting "the interests of fairness and equality, and to protect a person's rights under the European Convention on Human Rights" – to DBS's general rule that representations must be made in writing, and so should be mentioned in the published guidance on oral representations.

26. We have allowed this appeal only on the ground that DBS gave inadequate reasons for finding that it would be proportionate to include the Appellant in the Adults' Barred List. We are not satisfied that, if DBS were to reconsider the case, the only decision open to it would be either to include the Appellant in that list or not to do so. Accordingly, we remit the case to DBS for a new decision. We emphasise that DBS's reconsideration of the case need not be confined to the question of proportionality on the basis of its previous assessment of the Appellant's risk to vulnerable adults. All matters will be at large before DBS, including its assessment of that risk. Mr Wilkinson submitted that, if we were to allow the appeal, the Appellant should remain included in the Adults' Barred List until DBS makes its new decision. However, we are not satisfied that that is necessary in the present case and, accordingly, the Appellant must be removed from that list until the new decision is made.

Mark Rowland
Deputy Judge of the Upper Tribunal

Signed on the original on behalf of the Tribunal and authorised for issue on
1 August 2023